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**DEFENDING THE ABSURD: THE ICONOCLAST'S GUIDE TO SECTION 47(1)  
OF THE SUPERIOR COURTS ACT 10 OF 2013**

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**SUMMARY**

This contribution was intended as a defence of section 25(1) of the *Supreme Court Act* 59 of 1959. However, the Supreme Court Act was repealed in August 2013 and replaced by the *Superior Courts Act* 10 of 2013, and in the process section 25(1) of the former gave way to section 47(1) of the latter. Both sections concern the doctrine of leave to sue judges in South Africa. Both prescribe that any civil litigation against a judge requires the consent of the court out of which such litigation is to be launched. Both apply to civil suits against judges for damage caused by either their judicial or their non-judicial conduct.

Although section 25(1) had been one of the more inconspicuous sections of the *Supreme Court Act*, it was contested on occasion. Both curial and extra-curial challenges to section 25(1) assailed its constitutionality, alleging essentially that its provisions violated the right of access to courts enshrined in section 34 of the *Constitution of the Republic of South Africa, 1996* and that such violation did not meet the limitation criteria contained in section 36. It may be anticipated with considerable confidence, given its legal continuity with section 25(1), that any serious assault upon section 47(1) of the *Superior Courts Act* also will focus upon its relationship to section 34 of the *Constitution*.

This contribution is a pre-emptive defence of section 47(1) of the *Superior Courts Act* and, by extrapolation, a belated justification of section 25(1) of the *Supreme Court Act*. An attempt will be made to demonstrate, contrary to conventional wisdom, that section 47(1) does not limit section 34 and passes constitutional

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muster at the first level of enquiry, thereby obviating the need for advancing to the second level of enquiry contained in section 36 of the *Constitution*.

The jurisprudential crux of section 47(1) of the *Superior Courts Act* is embedded in the nature of the judicial office and its core value of judicial impartiality. The procedural immunity which the section affords South African judges is a mechanism for sparing them the nuisance of having to deal with frivolous litigation, either as defendant or as adjudicator. Every specious suit against a judge, *per definitionem*, represents an incursion into judicial impartiality by urging that the court give credence to a claim which does not qualify for curial adjudication. In this regard, the doctrine of leave to sue seeks to ensure that judges do not have to adjudicate claims which resort beyond the compass of their judicial capacity. It is a doctrine which operates to protect and advance the unimpeachable principle of judicial impartiality.

**KEYWORDS:** judicial immunity; leave to sue; suing judges; right of access to courts; civil litigation; judicial office; judicial independence; judicial impartiality.